(2)

No. 04-337

# In the Supreme Court of the United States

RICHARD P. CALLIPARI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

PAUL D. CLEMENT
*Acting Solicitor General*
*Counsel of Record*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

# In the Supreme Court of the United States

No. 04-337

RICHARD P. CALLIPARI, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES

Petitioner contends that his sentence under the federal Sentencing Guidelines was imposed in violation of the rule announced in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004). This Court has granted certiorari in *United States* v. *Booker*, No. 04-104 (Aug. 2, 2004), and *United States* v. *Fanfan*, No. 04-105 (Aug. 2, 2004), to consider whether *Blakely* applies to the federal Sentencing Guidelines, and, if so, how federal sentencing should be conducted in light of such a conclusion. If the Court were to hold that *Blakely* applies to the Guidelines, the proper disposition of petitioner's claim could be affected by such a holding (as well as by any applicable doctrines of waiver, forfeiture, and harmless error). Accordingly, the petition for a writ of certiorari should be held pending this Court's decisions in *Booker*

and *Fanfan*, and then disposed of as appropriate in light of the decisions in those cases.*

PAUL D. CLEMENT
*Acting Solicitor General*

SEPTEMBER 2004

---

* The government waives any further response to the petition unless this Court requests otherwise.

MR. MULLIN: Your Honor, Mr. Galvin may have misspoken. I think it's Note 7(b), the second paragraph, about two-thirds of the way through it.

THE COURT: He's telling me (a). I'm looking at (a).

MR. GALVIN: I apologize, your Honor.

THE COURT: Let me look at (b).

MR. GALVIN: Thank you.

THE COURT: Well, that has to do with fraudulent loan application and contract procurement cases.

MR. GALVIN: That's right, your Honor.

THE COURT: How does that apply here?

MR. GALVIN: It's an example of the type of case where multiple causation analysis still applies.

[25] THE COURT: The Court of Appeals never mentions that in Brennick. They were talking about Application Note 10. Look at Application Note 10. Seven doesn't apply here.

MR. GALVIN: Your Honor –

THE COURT: It's gone. That language is gone.

MR. GALVIN: Well, the guidelines still provide where loss overstates the seriousness of the offense. And that was one of the factors, the reason why the First Circuit in those cases, or part of the reason why the First Circuit adopted this analysis of where other factors contribute to the loss independent of this application note, your Honor.

THE COURT: Well, what other factors – let's assume you're correct. I don't think you are, but let's be clear on the record, what other factors do you say contributed to the $428,000 loss occasioned by Mr. Callipari's conduct on September 15th?

MR. GALVIN: That that conduct, the losses that resulted from Mr. Connolly's conduct in placing those trades was, in part, caused by his bipolar disorder, by his addiction to trading and by Fidelity's failure to supervise him in an appropriate manner.

With respect to the first factor, your Honor, there was an abundant display of evidence in this case [26] as to Mr. Connolly's personal problems. As your Honor correctly noted, he was a wild card. He was so because of his erratic behavior. By his own admission, he was under a bipolar disorder at this time.

Sentencing Courts on numerous occasions have taken such factors into consideration at sentencing because it reflects on the culpability of the participants. Mr. Connolly wasn't like perhaps other fraud defendants. He had a long and troubled history that came with him, both into this courtroom, but also were with him at the time the underlying conduct was taking place back in 1997.

He admitted that at trial. He admitted that he had suffered from those types of conditions for a long time and that they caused him to do things that he didn't want to do. He couldn't control himself, is how he testified at trial. He promised to stop doing this. He swore on his children's eyes, as he put it, to stop in August. And when we asked why he kept doing it, he said, I wish I could tell you why. I just was unable to stop.

It was partly because of that that he was trading in the first place on September 15th. Perhaps not – in giving your Honor's findings, I'm not going to argue it was the sole reason he was doing it. It [27] may not have been the predominant reason he was doing it; but one of the factors that contributed, one of the reasons why he was in that place to begin with was the fact that he had this mental disorder, bipolar condition, which is a well-recognized mental disorder.

It's in the Diagnostic and Statistical Manual as recognized as one, and the symptoms of that disorder are what was on display for everyone to view in this trial. Erratic behavior, poor financial decisions are all hallmarks of that disorder, your Honor. He acknowledged it. We've asked to try to get additional proof of it; but I think on the record that the Court has heard, there is enough of a basis for this Court to conclude that he did suffer from those disorders and that those disorders contributed to it.

He also testified that he had an addiction to trading, which has also been recognized by other sentencing Courts as a reason why they should impose less of a sentence. Other defendants who were addicted to gambling and, therefore, got into drugs, sentencing Courts have taken that into consideration.

The third factor, your Honor, is Fidelity's culpability here. And notwithstanding the rulings at trial, here at sentencing there are different issues; and we believe it is relevant to sentencing to weigh [28] what Fidelity did here, why it was that on Tuesday, September 16th, Mr. Connolly could ignore the instructions Mr. Callipari gave him to stop and to end doing it.

He opted on his own to pursue his own theory of pure speculate theory of trading, as he put it. He didn't like to hedge. He wouldn't hedge. He wanted to leave these positions, let them ride. He could do that because he had the option of leaving them in a Fidelity account overnight, one day, two days.

In June of 1997, he left them open in an account for six days. The Government's own expert testified that those were – that would have been, should have been a red flag. Leaving multi-million dollar positions open for multiple days should have tipped someone off at Fidelity to look at what Mr. Connolly was doing, to monitor his behavior.

That didn't happen in this case. And because of that, Mr. Connolly had the option on Tuesday of letting it ride, of venturing into this hugely risky behavior, as a result of which there was a multi-million dollar loss; but it wasn't solely because of the fact that, as the Government has put it, that he was in a conspiracy with my client. He was in it for himself at that point.

[29] And as a result, that factor contributes to the underlying loss and should be reflective in the sentencing as well, your Honor. That's it for now with respect to –

THE COURT: I understand that your downward departure motion is based on 5K2.0.

MR. GALVIN: Yes, your Honor.

THE COURT: Okay. Mr. Mullin?

MR. MULLIN: Your Honor, the loss that you found, the $428,000, is based solely on the trading in the 905 puts. And I think the two grounds articulated by the

defense do not in any way overstate the seriousness of the trading with regard to the 905 puts.

Those trades, the first two trades in the 905s are done on Monday afternoon by Mr. Connolly at the express direction of Mr. Callipari. Those trades were left open until Wednesday morning when Mr. Callipari himself called Mr. Srock and closed those trades, and the resulting loss was $428,000.

Whatever the defense's arguments may have been for the other trading that T.J. Connolly did on the 16th and the 17th and any effect that any bipolar disease might have, it had no impact on the 905 puts and the loss that resulted there.

I would also say, your Honor, that both with [30] regard to all the trading and particularly the 905 trading, I don't think there's any basis to find that the conduct of Fidelity here contributed to the loss. In every case in which an employee of a corporation ends up participating in a fraud against the corporation, there's some kind of breakdown in internal controls, people learn how things can be done.

With regard to these 905 puts, the reason these didn't come to Fidelity's attention on the morning of the 16th is because Mr. Callipari agreed to accept them. And when they came into his account, he didn't notify Fidelity, and he hadn't notified Fidelity on any other of the times throughout the summer when that had happened.

Mr. Connolly also had the assistance of Mr. Srock in being able to hide things. And, therefore, we would urge the Court not to depart down and certainly not on either of these two bases.

THE COURT: The Defendant has moved for a downward departure pursuant to 5K2.0. And he has cited two bases, as I understand it, for his motion, the first relying on Mr. Connolly's condition; but I think, again, Mr. Mullin has correctly stated that because the Court is holding Mr. Callipari responsible for the $428,000 loss occasioned by his own actions on the [31] 15th, again, I go back to that telephone call between the Defendant and Mr. Srock, he doesn't say, Did Connolly do anything today? He says, Are we open on anything, which indicates his knowledge of previous activities, his knowledge that all three, he, Connolly and Srock, were in this together.

He then tells Srock to be careful, and Srock says, I'll watch it. That was part of their MO. Srock was watching what Connolly was doing and reporting back to Callipari. Connolly's mental condition didn't have anything to do with those trades at all that day.

Connolly, it's clear, has mental health problems. He's got addiction problems, both to substances and perhaps to this trading activity which is, in my mind, simply for Connolly at least legalized gambling. And these folks were risk-takers, big risk-takers, and Callipari was a knowing and active participant in that risk-taking activity.

And so the first thing I'd have to do is make a determination following Mr. Galvin's argument that the $400,000 loss figure that I've assigned here, give or take, overstates the seriousness of the conduct. It does not in the least. This was activity that was going on for a period of months. Mr. Callipari was directing much of the activity, and he was providing [32] Connolly a safe haven for his actions.

So for me to make a determination that the $400,000 loss figure overstates the seriousness of the conduct I

think flies in the face of the totality of all of the evidence in this case. It's a drop in the bucket.

Secondly, to try to point the finger at Fidelity, could Fidelity have watched Connolly a little more closely? Perhaps they could have. Perhaps Mr. Connolly's rather engaging personality got him out of a jam on more occasions than it should have, but I think it's really sort of silly for Mr. Callipari now to try to point the finger at Fidelity and say, Well, if they had done a better job of policing Connolly, then I wouldn't be in the jam I'm in today.

No amount of policing by Fidelity would have changed the outcome of September 15th. Mr. Callipari was an all too willing participant to tell Srock and Connolly to park those trades in his account at JAS where Fidelity would have no idea that they were residing.

So the first thing I say is, I don't think that the amount of loss as determined by the Court here overstates the seriousness of the conduct. It was ongoing conduct. It involved hundreds and hundreds of [33] thousands of dollars over a protracted period of time. I think that the $428,000 loss figure that the Court has held Mr. Callipari accountable for here is a very conservative number, and so the motion on that basis alone should be denied.

To point the finger at Connolly's mental health and substance abuse problems, again, I don't think those come into play when you look at the loss figure that I've found.

And thirdly, the pointing the finger at Fidelity, as I say, we can all be Monday morning quarterbacks, but I don't think that pointing the finger at Fidelity in this case warrants a downward departure either. So for those reasons, the Motion for Downward Departure is denied.

That leaves us, Mr. Galvin, with a criminal history of 1 and a total offense level of 19, which provides for a guideline range of 30 to 37 months of incarceration. I will hear the Government on sentence.

MR. MULLIN: Your Honor, I think the Defendants did raise an issue about disparate sentences between Mr. Connolly and Mr. Callipari as a request for a departure.

MR. GALVIN: I did, your Honor, and I apologize.

THE COURT: And that's a discouraged ground, I [34] think, isn't it?

MR. GALVIN: It is, your Honor.

THE COURT: Do you want to speak to that?

MR. GALVIN: I do. Whatever the – the Court has ruled that Mr. Callipari should be held responsible for this 428 and that no part of it was attributable to Mr. Connolly. However, this whole scheme, when the Court uses, or judges, and compares culpability levels here, at least in cases where there's an exceptional difference because it is a discouraged ground, as we noted in our filing, the Court can, in some instances, depart on that basis as well.

We would urge the Court to do so. As we indicated in our filing, the most culpable party here is Connolly. He was the vice president of Fidelity. He was the one who started this. Mr. Callipari had nothing to do with its start. He was at Fidelity at that time in August of 1996, almost a year before this whole scheme unraveled. Mr. Callipari was still there.

Mr. Connolly engaged in this conduct for himself and for his own benefit to try to impress others, not Mr. Callipari, that he could trade and to try to get himself a better job. That conduct continued for 10 months before Mr. Callipari was ever alleged to have engaged in that conduct with Mr. Connolly.

[35] There was one instance in January of '96 or – December of '96 or January of '97 when Mr. Callipari was consulted. He did provide some advice, but he also said to stop, don't trade for people who are not customers. And in our view, there was no other occasion when Mr. Callipari necessarily would have known that Mr. Connolly was trading for non-Fidelity customers.

He continued to do that throughout the spring, at the time when Mr. Callipari was not employed either at Fidelity or anywhere else. Between April and July – excuse me, June – excuse me, July of 1997, that trading continued with JAS. All of that Mr. Connolly did on his own and doesn't in any way involve Mr. Callipari.

It did occur for a two-month period with Mr. Callipari in the summer of 1997, the end of which, on August 21st, 1997, he was instructed again by my client, Mr. Callipari, to stop, stop doing this, end it, knock it off. Mr. Connolly testified that he tried to stop doing it but just was not able to control himself.

In view of all of that, your Honor, when measuring the relative culpabilities, we feel this is an appropriate case to depart on this basis as well.

[36] THE COURT: Mr. Mullin?

MR. MULLIN: Your Honor, we would oppose a departure on those grounds. One, we don't know what Mr.

Connolly's sentence will be. I can tell the Court that the sentencing in Boston, we have submitted $2.39 million as the loss figure, and we haven't heard yet from the defense as to whether they're going to object to that.

I also think that the two Defendants are not similarly situated. Mr. Callipari profited by $220,000 from this conduct. Mr. Connolly got zero dollars from the conduct. Mr. Connolly came in and pled guilty immediately after being charged and will be entitled to a reduction in his guidelines by three levels for acceptance of responsibility. Mr. Callipari has yet to ever accept responsibility for his offenses.

Mr. Connolly has cooperated. We expect that we will be filing a 5K1.1 motion. And during the course of the investigation, we did reach out to counsel for Mr. Callipari to see if he was interested in cooperating. There were other people involved in this conduct, namely Mr. Englander and the partners at JAS. They have never been prosecuted, and there never was any cooperation.

THE COURT: As Mr. Galvin has quite candidly [37] indicated to the Court, disparate sentences is a discouraged guideline departure basis. And on that basis alone, the Court could go ahead and deny the request for a downward departure. Quite frankly, Mr. Galvin, I think in this case it really strains credulity for you to make such a motion based on that ground.

In this case, as Mr. Mullin points out, Connolly himself got nothing substantive. All he got was whatever rush he got in doing this trading and trying to be a big shot so that maybe he'd get a better job. Connolly pled guilty. So far as I know, he hasn't been charged or convicted of obstruction, has he?

MR. MULLIN: He has not, your Honor.

THE COURT: And Mr. Callipari has. And that pretty much says it all, Mr. Galvin. By my calculation, if Mr. Callipari had accepted responsibility and not committed perjury in this case, that's a five-level swing in and of itself.

And then Connolly also has agreed to cooperate with the authorities, and so the two aren't even in the same ballpark. And so disparate sentences in this case, there's a very good reason why there will be a disparate sentence. Mr. Callipari has elected to go forward with a trial. He's been found guilty. That's [38] his constitutional right, but he did himself no favors when he had an opportunity to tell the truth and ended up committing perjury, which resulted in an additional two-level increase in his offense level.

So I just don't see the two of them being on an equal plane. Was Connolly the fellow who started all of this? Yes, he was, but the brains behind the operation, quite frankly, is Mr. Callipari. He was the guy who was actually getting something out of it. So I am not inclined at all to depart based on that ground for those reasons.

All right. Mr. Mullin, now I'll hear you on sentence.

MR. MULLIN: Your Honor, the United States would recommend, given the findings that the Court has made on loss and without abandoning any positions we've previously taken, in the guideline range that you found, the United States would recommend 30 months of incarceration, a fine in the amount of $7,500, two years of supervised release and $1,200 in special assessments.

Shall I address the reasons why we make those recommendations?

THE COURT: I think it would be a good idea if you did.

MR. MULLIN: We think that essentially the [39] sentence would address two sentencing objectives, punishment and deterrence, principally deterrence of others. Thirty months of incarceration is a serious sentence. It's two-and-a-half years away from one's family.

We think that the conduct that went on here, although you found the loss in the $400,000 range, you've also noted that this conduct went on for quite a while, there was a lot of money involved, certainly great risk of even greater losses was undertaken. We think that that sentence will address that. We also think that it will deter others who may be in the securities industry, hear of this case and be deterred from that conduct.

THE COURT: Mr. Galvin?

MR. GALVIN: Your Honor, we agree that given the Court's findings that that is the appropriate sentence. We did submit a number of letters that were addressed to the Court.

THE COURT: I should note for the record that the defense has submitted to the Court, in addition to its sentencing memorandum, I think some 37, 38 or more letters, some of which came directly to the Court, I think I sent back out to counsel, all of which attest to the Defendant's many charitable contributions, his [40] participation in his family. I understand that the family has had some losses and that Mr. Callipari has always given more,

perhaps, than was even expected of him. So I have all of that.

MR. GALVIN: Thank you, your Honor.

THE COURT: Okay. Mr. Callipari, I have determined in this case that I must impose a sentence of incarceration of at least 30 months or as much as 37 months. Before I impose sentence, is there anything you would like to say on your own behalf?

THE DEFENDANT: No. Thank you.

THE COURT: This is a very tragic case. Mr. Callipari, up to the point in time where he and Mr. Connolly concocted this scheme which resulted in substantial loss to Fidelity and substantial gain financially to Mr. Callipari, had led an exemplary life, a real American success story.

Here's an individual who had no real formal education but has a gift, apparently, for being a success in the securities industry.

Mr. Callipari, you were making a lot more money than all federal judges. You were making more money than most practicing lawyers, people who have gone through four years of college, three years of law school. You were making lots and lots of money. You [41] had the good life. But you got greedy, and that greed is going to cost you and your family dearly.

That's why I say this is a real tragedy, because you had it made. You had a nice house. You had a nice family. And this will cost not only you but all of them dearly because as a result of your conviction in this case, it's my understanding you will never be permitted to work in the

securities industry again. And from what I can see, you're really not qualified to do much of anything else.

And so you've lost your livelihood. You will have to figure out what sort of a job you're going to have after you get out of prison; but with a felony conviction and a felony conviction for fraud, I think that's going to be very difficult for you. And so your quality of life will go south, as they say, both for you and your family. There won't be any more private schools, and there won't be any more fancy houses, and there won't be any more country club memberships.

In addition to all of that, you're going to go to prison, and prison is not a pleasant place. I'm sure your lawyers have explained that to you. That's something you're going to have to explain to your children. I've read their letters, and they really look up to you, but you're going to have to explain to [42] them why you're going to prison. And I don't envy you having to have that conversation with your children either.

Your wife is about to have a new baby; and from what I understand, there are going to be some complications involved there. And so you won't be around to help her during the first couple of years of that child's life.

And so your greed, Mr. Callipari, really has turned your life and the lives of your family on end. And you really have no one to blame really but yourself. Pointing the finger at T.J. Connolly, he was an instrumentality. He was an opportunity which you utilized for your own benefit.

I agree with the Government that a sentence in this case at the low end of the guideline range is sufficient, I think, to punish you because beyond the 30 months of

incarceration that I impose, you will have all of those other things to deal with in your life.

And so I will accept the Government's recommendation here and impose sentence as follows: A term of incarceration of 30 months to be followed by a term of supervised release of two years. Because this is an economic crime, I am imposing a fine of $7,500 and waiving any interest payments on that because, as I [43] say, I think when Mr. Callipari is released from prison, he's going to have a difficult time finding employment. I must impose the special assessment of $100 per count for a total of $1,200.

I am not going to order restitution in this case because the information that I have is that Mr. Callipari and Fidelity have undergone an arbitration of their dispute and that Fidelity and he have executed mutual releases, and so I take that as Fidelity being satisfied with whatever it is that they've agreed upon. So I'm not ordering restitution in this case. If it were not for that, I probably would be ordering it.

Mr. Callipari, you have a right to take an appeal from the sentence I've imposed here today. If you cannot afford an attorney to assist you with an appeal, you should advise the Court, and counsel will be appointed for you. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: If you wish to take an appeal, you must file your Notice of Appeal within the next 10 days. Otherwise, you will have lost your right to take an appeal. Do you understand that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Now, I understand that there is a [44] request here that Mr. Callipari not have to report until after the birth of the child. Is that correct?

MR. GALVIN: Yes, your Honor.

THE COURT: What is the due date?

MR. GALVIN: July 25th.

THE COURT: The Defendant is ordered to report to whatever facility he is designated to by the Bureau of Prisons by 2 p.m. on August 25, 2003. What that means, Mr. Callipari, is that you can surrender to whatever facility you've been designated to by the Bureau of Prisons. You have until 2:00 on August 25th to do that.

If you fail to appear, that's considered an escape, and your lawyers can explain to you what that means. If you can't get yourself to whatever facility you've been designated to, you can surrender to the United States Marshals.

I am not going to designate a particular facility. I know there's a request for Otisville. However, I will make a strong recommendation to the Bureau of Prisons that Mr. Callipari be designated to a facility that is near where his family lives so that he may maintain contact with them.

Is there anything further?

MR. MULLIN: Not from the United States, your [45] Honor.

MR. GALVIN: No, your Honor. Thank you.

THE COURT: Mr. Callipari, as I said earlier, this is something you brought on yourself, sir. It may have seemed like a lark when you got started, but it was very serious business, as I'm sure you now understand, and the consequences go far beyond any prison term you're going to serve.

This will be with you for the rest of your life; but as Mr. Mullin has said, there are reasons for incarcerative sentences, and one is to punish you for what you've done; but the other, and in this case I think this may be even more important than punishing you, is to send a message to anyone like you out there who thinks that they want to play these games with other people's money, what they need to understand is that it will cost them very dearly. And so for that reason, I have imposed the sentence today. We're adjourned.

(Adjourned)

[46] CERTIFICATION

I, Karen M. Bettencourt, RPR-RMR-CRR, do hereby certify that the foregoing pages are a true and accurate transcription of my stenographic notes in the above-entitled case.

Karen M. Bettencourt, RPR-RMR-CRR

_____

Date

United States District Court
**District of Rhode Island**

| | |
|---|---|
| UNITED STATES OF AMERICA<br><br>v.<br><br>**RICHARD P. CALLIPARI** | **JUDGMENT IN A CRIMINAL CASE**<br>(For Offenses Committed On or After November 1, 1987)<br><br>Case Number:<br>**1:02CR00067-01ML**<br><br>**James W. Ryan, Esq.;**<br>**Michael A. Collora, Esq.;**<br>**Michael B. Galvin, Esq.**<br>Defendant's Attorneys |

**THE DEFENDANT:**

[ ] pleaded guilty to count(s): _____.
[ ] pleaded nolo contendere to count(s) ___ which was accepted by the court.
[✓] was found guilty on count(s) **1 through 12 of the indictment** after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offense(s):

| Title & Section | Nature of Offense | Date Offense Concluded | Count Number(s) |
|---|---|---|---|
| **18 U.S.C. § 371** | **Conspiracy to Commit Wire Fraud** | **September 19, 1997** | **1** |
| **18 U.S.C. § 1343 and 18 U.S.C. § 2** | **Wire fraud; Aiding and Abetting** | **September 19, 1997** | **2 through 11** |
| **18 U.S.C. § 1505** | **Endeavoring to Obstruct an SEC Proceeding** | **February 11, 1998** | **12** |

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) ___ and is discharged as to such count(s).

[ ] Count(s) dismissed on motion of the United States: ___.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.:
**050-40-3712**

Defendant's Date of Birth:
**9/30/1962**

Defendant's USM No.:
**05210-070**

Defendant's Residence Address:
**5 Hill Road**
**Washingtonville, NY 10992**

Defendant's Mailing Address:
**5 Hill Road**
**Washingtonville, NY 10992**

**April 28, 2003**
Date of Imposition of Judgment

/s/ Mary M. Lisi
Signature of Judicial Officer

**MARY M. LISI**
**United States District Judge**
Name & Title of Judicial Officer

April 29, 2003
Date

**IMPRISONMENT**

**The defendant is hereby committed to the custody of the United States Bureau of Prisons to**

**be imprisoned for a total term of 30 months as to Counts 1 through 12; all terms to be served concurrently with each other.**

[✓] The court makes the following recommendations to the Bureau of Prisons:

**That the defendant be placed in a facility near where his family resides.**

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States marshal for this district.
[ ] at _____ on _____.
[ ] as notified by the United States Marshal.

[✓] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[✓] before **2:00 p.m.** on **Monday, August 25, 2003**.
[ ] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Officer.

**RETURN**

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

_____
By Deputy United States Marshal

## SUPERVISED RELEASE

**Upon release from imprisonment, the defendant shall be on supervised release for a term <u>two (2) years as to Counts 1 through 12; all terms to be served concurrently with each other</u>.**

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

*For offenses committed on or after September 13, 1994:*

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter.

[ ] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

[✓] The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payment set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

## STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

## CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth on **Page 5**.

| | Assessment | Fine | Restitution |
|---|---|---|---|
| **Totals:** | $ 1,200.00 | $ 7,500.00 | |

[ ] The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amount listed.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all non-federal victims must be paid in full prior to the United States receiving payment.

| Name of Payee | *Total Amount of Loss | Amount of Restitution Ordered | Priority Order or Percentage of Payment |
|---|---|---|---|

**TOTALS:**

[ ] If applicable, restitution amount ordered pursuant to plea agreement. $ _____

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on the Schedule of Payments may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[✓] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

---

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, for offenses committed on or after September 13, 1994 but before April 23, 1996.

[✓] the interest requirement is waived for the
[✓] fine and/or [ ] restitution.
[ ] the interest requirement for the
[ ] fine and/or [ ] restitution is modified as follows:

## SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties shall be due as follows:

**A** [X] Lump sum payment of $ 8,700.00 due immediately.

[ ] not later than _____ , or
[ ] in accordance with [ ] **C**, [ ] **D** or, [ ] **E** below; or

**B** [ ] Payment to begin immediately (may be combined with [ ]**C**, [ ] **D** or, [ ] **E** below); or

**C** [ ] Payment in ___ installments of $ ___ over a period of ___, to commence ___ after the date of this judgment; or

**D** [ ] Payment in ___ installments of $ ___ over a period of ___, to commence ___ after release from imprisonment to a term of supervision; or

**E** [ ] Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are to be made to the clerk of the court, unless otherwise directed by the court, the probation officer, or the United States Attorney.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant Name, Case Number, and Joint and Several Amount:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

**STATEMENT OF REASONS**
**(Not for Public Disclosure)**

[ ] The court adopts the factual findings and guideline application in the presentence report.

**OR**

[✓] The court adopts the factual findings and guideline application in the presentence report, except:

**The Court finds that the appropriate amount of loss is $428,312.50, which results in a 9-level increase under U.S.S.G. § 2F1.1(b)(1)(J), rather than a 12-level increase under § 2F1.1(b)(1)(M), based on a $2.39 million loss.**

**Guideline Range Determined by the Court:**

Total Offense Level: 19

Criminal History Category: I

Imprisonment Range: 30 to 37 months

Supervised Release Range: 2 to 3 years

Fine Range: $6,000.00 to $60,000.00

[ ] Fine is waived or is below the guideline range, because of inability to pay.

Total Amount of Restitution: $___

[ ] Discretionary restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(a)(B)(ii) (or in offences committed before April 23, 1996, pursuant to 18 U.S.C. § 3663(d)).

[ ] Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 U.S.C. § 3663A(c)(3)(A)

[ ] Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because determining complex issues of fact and related to the cause of amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process, pursuant to 18 U.S.C. {S{3663A(c)(3)(B).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters

109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered, pursuant to 18 U.S.C. § 3553(c), for the following reason(s):

[✓] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

**OR**

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

**OR**

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reason(s):

---

**United States Court of Appeals**
**For the First Circuit**

---

No. 03-1647

UNITED STATES

Appellee

v.

RICHARD P. CALLIPARI

Defendant-Appellant

---

Before

Boudin, *Chief Judge*,
Torruella and Selya, *Circuit Judges*,
Stahl, *Senior Circuit Judge*,
Lynch, Lipez and Howard *Circuit Judges*.

---

ORDER OF COURT
Entered: June 7, 2004

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be *denied*.

By the Court:
RICHARD CUSHING
DONOVAN, Clerk

By: MARK R. SYSKA
Chief Deputy Clerk

[cc: James W. Ryan, Esq., Michel A. Collora, Esq., Michael B. Galvin, Esq. Amy M. Baron-Evans, Esq., Terrence P. Donnolly, AUSA, Peter A. Mullin, AUSA, Adam J. Bookbinder, AUSA, Dina M. Chaitowitz, AUSA, Marc Osborne, AUSA]